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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

CHUCK HEERLYN,

Plaintiff and Appellant,

v.

FRANCIS M. REID,

Defendant and Respondent

B174233

(Los Angeles County
Super. Ct. No. VC037531)

ORDER MODIFYING OPINION
AND DENYING REHEARING;
NO CHANGE IN JUDGMENT

THE COURT:

It is ordered that the opinion filed herein on January 21, 2005, be modified in the following particulars:

1. On page 2, the first full paragraph, beginning “Plaintiff appeals a summary judgment” is deleted and the following paragraph is inserted in its place:

Plaintiff appeals a summary judgment granted in favor of a landlord who rented a property to the owner of a dog which bit the plaintiff.

Plaintiff has not produced evidence creating a triable issue of fact as to the landlord’s actual knowledge that the dog showed dangerous or vicious propensities before the dog bite occurred, and therefore summary judgment was correctly granted. The landlord’s lack of actual knowledge likewise

bars plaintiff's general negligence cause of action based on the landlord's failure to properly maintain the fence and property, because without knowledge of a dog's propensities a landlord will not be able to foresee a danger posed by the animal and will not have a duty to take measures to prevent an attack. Although plaintiff claims the summary judgment motion did not address a cause of action for negligence per se based on violation of a leash law, the complaint did not allege that theory of liability and plaintiff cannot obtain reversal of summary judgment on theories of liability not pleaded in the complaint. We affirm the grant of summary judgment for defendant.

2. The caption of part 2 of the "discussion" commencing on page 9, line 18, and the paragraph commencing at the bottom of page 9 with "Heerlyn claims that two other bases" and ending at the top of page 10 with "not pleaded in his complaint" are modified to read as follows:

2. *Defendant's Lack of Knowledge of the Dog's Propensities Precludes General Negligence Liability, and Heerlyn's Complaint Did Not Allege Negligence Per Se for Violation of Leash Laws*

Heerlyn claims that two other bases for finding Reid liable exist: (1) general negligence in failing to properly maintain the fence and property, which allowed the dog to escape and injure Heerlyn; and (2) negligence per se for possible violation of leash laws regarding the dog.

With regard to negligent failure to properly maintain the fence and property, this raises an issue concerning the second step of the *Donchin* analysis, i.e., whether a landlord had the ability to prevent the foreseeable harm. (*Donchin v. Guerrero, supra*, 34 Cal.App.4th 1832, 1838.) We have concluded, however, that Reid did not have notice of the vicious nature of the dog that harmed Heerlyn. "Without knowledge of a dog's propensities

a landlord will not be able to foresee the animal poses a danger and thus will not have a duty to take measures to prevent the attack.” (*Ibid.*)

Therefore the general negligence cause of action fails.

With regard to negligence per se for possible violation of leash laws regarding the dog, the complaint did not allege this theory of liability. A party moving for summary judgment need only negate theories of liability as alleged in the complaint. Opposition to a motion for summary judgment may not create issues outside the pleadings and are not a substitute for amendment to the pleadings. (*Residential Capital v. Cal.-Western Reconveyance Corp.* (2003) 108 Cal.App.4th 807, 829.) Heerlyn cannot obtain reversal of summary judgment on a theory of liability not pleaded in his complaint.

3. There is no change in the judgment.
4. Appellant’s petition for rehearing is denied.